

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

EMPLOYERS MUTUAL CASUALTY	)	
COMPANY, an insurance company	)	
Incorporated in the State of Iowa;	)	
V.	)	CIVIL ACTION NUMBER
OLLIE WADSWORTH; and	)	2:05 CV 602-T
JOSEPH M. PEIL,	)	
	)	
Defendants.	)	

**MOTION TO DISMISS**

Comes Now the defendant, Ollie Wadsworth and files this Motion pursuant to Rule 12(b)(6)(1) and moves this Court to dismiss this action as for lack of subject matter jurisdiction as the amount in controversy requirement of 28§USC 1332 has not been met. In support of this Motion, Wadsworth shows the following:

1. There is an action for declaratory judgment filed by EMC, as insurer against Wadsworth, its insured, and Peil who has filed suit against Wadsworth in state court. Wadsworth tendered Peil's underlying suit to EMC for both defense and indemnity. EMC has been defending the suit under reservation of rights, but now filed this action seeking a declaration that there is no coverage for Peil's claim under EMC's policy.
2. Importantly, in Peil's state court complaint he specifically requested only \$60,000.00, an amount less than the minimal jurisdictional threshold of this court. Accordingly, Wadsworth asserts here that the dispute between Peil,

Wadsworth and EMC only involves \$60,000.00 and that this Court lacks subject matter jurisdiction over this case under 28 USC §1332.

3. EMC, recognizing that it must prove the existence of a sufficient amount in controversy, asserts in its complaint that the potential attorney's fees to be incurred by EMC defending Peil's state court suit must be considered by this court when analyzing the amount in controversy issue. Yet, this assertion is strained at best as it requires this court to assume that Peil's claim will result in a \$60,000.00 loss and to assume that an indeterminate cost of defense will exceed \$15,000.00. In fact, Peil's entire claim can be resolved for \$60,000.00.
4. In support of its claims that this court must consider an alleged \$15,000.00 in potential defense cost when determining the amount in controversy EMC cites cases in which a significantly different factual situation existed. For example, Greenberg does not even address inclusion of cost of defense in the "amount in controversy." Rather, it deals with inclusion of an insured's claim for statutory attorney's fees in a suit against the insurer for breach of an insurance contract. St. Paul v. Greenberg, 134 F.3d 1250 at 1252 (See N. 1) (5<sup>th</sup> Cir. 1998). Stonewall Insurance Company v. Lopez, 544 F.2d 198 (5<sup>th</sup> Cir. 1976), an insurer filed suit against an insured seeking a declaration that a policy did not provide coverage. Importantly there, the policy limit was exactly \$10,000.00, the jurisdictional threshold amount under 28 USC §1332 in the year 1976. In Lopez, the court presumed that one dollar in defense cost would push the amount in controversy between insured and insurer above the

\$10,000.00 threshold. Unlike Lopez, here, Wadsworth enjoys a \$15,000.00 “cushion” between the amount sought by Peil and the now \$75,000.00 threshold.<sup>1</sup>

5. The party asserting the existence of the jurisdictional amount in controversy bears the burden of proving jurisdiction. St. Paul Reinsurance Co. v. Greenberg, 134 F.3d 1250 (5<sup>th</sup> Cir. 1998). In this circuit, the burden of proving the existence of a sufficient amount in controversy has been described as a heavy one. Burns v. Windsor Ins. Co., 31 F.3d 1092 (11<sup>th</sup> Cir. 1994). EMC must show that the amount in controversy probably exceeds \$75,000.00. Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11<sup>th</sup> Cir. 1996).
6. Here, the underlying suit is basically a contract case to be decided on the language in the papers. The parties will essentially agree on what happened and the dispute will be over the legal significance of those facts. The court cannot assume that the cost of defense will exceed \$15,000.00 to find jurisdiction. Jurisdiction should not be found based on a claimed future attorney’s fees that are indeterminate and speculative. See Federated Mutual Insurance Co. v. McKinnon Motors, LLC, 329 F.3d 805 (11<sup>th</sup> Cir. 2003). Federal court jurisdiction is limited by statute. This court should not expand and assert jurisdiction over this case by speculating that the future cost of defending the underlying action will exceed another \$15,000.00.

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<sup>1</sup> The court in Motorists Mutual Insurance Company v. Simpson discussed the issue in dicta, but did not make any determination about it. Both Simpson and Allstate v. Dillard, which it cited involved claims of exactly \$10,000.00 the then statutory threshold. In each case and penny of defense cost pushed the amount in dispute over the threshold.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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